IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 603 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KOLI THAKARDA BABUBHAI BHAGABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 603 of 1991

MR PJ YAGNIK for Petitioner

MR K.P.RAWAL, ADDL.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

Date of decision: 18/06/98

ORAL JUDGEMENT Per Bhatt,J.

The inevitable outcome of this appeal at the instance of

the appellant-original accused is failure and rejection being totally meritless .The factual scenario emerging from the record of the present case has not only shocked us but has also squeezed our conscience,particularly in view of the wanton apathy and violent militant indifferene on the part of the respondent-State in acquiescing in acquittal of the accused under Sections 366, 302 and 376 of the IPC and also judicial treatment meted out in the trial and confusion of not only the concept of law but of the concerned authority. We are sorry to place the aforesaid observations ,but we cannot resist our temptation of placing the same on record after having extensively explored the entire testimonial collection and documentary evidence and the submissions during the course of hearing.

A short resume of the prosecution case giving rise to birth of this appeal may be narrated at the outset. The appellant herein is the original accused came to be charged by the trial court for the offences punishable under Sections 366,376 and 302,IPC and also under section 135 (1) of the Bombay Police Act,in view of the ghastly incident stealing the heart which occurred on 8.1.1991 in the evening at 6 p.m. in the sim behind Khodiyar temple in village Undai in Banaskantha district.The prosecution case has been that the appellant allured and kidnapped one baby girl Takhi,aged about 5 years ,daughter of complainant Rama Shendha so as to satisfy his lust. The appellant after taking baby Takhi along with him ,committed rape and also injured her private part with the help of knife and thereafter satisfied his lust like a Demon and intentionally killed baby Takhi. Charge came to be framed by the learned Sessions Judge on 15.5.1991. The appellant pleaded innocence and thereafter the trial court, upon assessment and examination of the evidence, reached the conclusion whereby the accused was granted unmerited acquittal of the charges under sections 366, 302 and 376,IPC and also under section 135 (1) of the Bombay Police Act.Instead, the trial court found the appellant guilty for the offence under sections 304-II IPC and sentenced him to undergo R.I.for ten years and to pay fine of Rs1,000/-,in default, to undergo S.I.for six months. The trial court also found the accused guilty for offence under Section 376 read with section 511 IPC and for that, imposed sentence of R.I. for five years and fine of Rs. 1,000/and in default, to undergo S.I. for six months.Again , the trial court directed the appellant to undergo both the sentences concurrently giving benefit of period as undertrial prisoner and also directed for disposal of muddamal blood stained clothes, knife and other articles , vide judgment and order

recorded on 21.6.1991 in sessions case No.45 of 1991 which is precisely challenged by the original accused by filing this appeal through jail.

The order of conviction and sentence challenged in this appeal obviously cannot be as in our opinion, prima facie, acquittal from the main offences under sections 366,302 and 376 appears to us unmerited. Therefore, upon a pointed query to the learned Additional Public Prosecutor, we were shocked to learn that the State had acquiesced in the manner and mode in which the trial is conducted before the learned Sessions Judge and the way in which the impugned order is acquiesced by the State can hardly receive any acknowledgment of conscience part. We have not been able to comprehend as to what and how the State chose to acquiesce in this case when a baby of 5 years is mercilessly not only physically exploited and emotionally ruined but also became the victim of lust of the appellant.

The following aspects have emerged from the record unimpeachably:

(i) the deceased baby Takhi was aged about 5;
(ii) she was allured and taken away by the appellant behind the Khodiyar temple in the sim to satisfy his lust and perversity of sex;

(iii) Finding penetration difficult in the beginning, the appellant heartlessly employed knife to create more passage in the vagina and made a cut of 3" x 2" in the upper part of the private part of the baby. Medical evidence on this score has remained totally unimpeachable;

(iv) the appellant allured the baby by offering tophy and after kidnapping her, acted like wolf with the tender body , delicate mind and life of the baby.Post mortem report in this behalf lends material reinforcement.

(v) the prosecution has successfully shown that muddamal knife was discovered by the appellant and panchnama prepared in this behalf has been proved. The medical evidence has unambiguously proved forced penetration and rupturing of hymen leading to only conclusion of rape;

(vi) the prosecution case is substantially and significantly supported by various circumstances and number of witnesses.FIR was lodged at the

earliest moment and muddamal knife came to be recovered by the appellant upon his information. The witnesses who heard the helpless shouts and cries of baby Takhi at the time of commission of heinous offence by the appellant,have stood by the prosecution case in course of the trial.

In order to establish the case,the prosecution placed reliance on the evidence of the following witnesses:

1. Dr. D.V.NAYAK,EX. 7
2. Jeramgiri V Gosai,ex. 14
3. Ramabhai Sendhabhai,ex.17
4. Lakha Baba ,ex.19
5. Manabhai w/o Bababhai,ex. 20
6. Savabhai Khetabhai ex. 21
7. Jorabhai Bijalbhai ex. 26
8. Raycnahdbhai Masaji,ex. 27
9. Abdulkhan Alikjhan,ex, 28
10. Laxmanbhai Kaluram ex,32
11. Gulmohmed Akbarkhan ex.33
12. Umedbhai Rupabhai ex. 36
13. Karamsibhai Kurshibhaiex. 38

The prosecution also placed strong reliance on the following documentary evidence :

1. Medical certificate, ex 9
2. Complaint,ex18
3. Inquest panchnama ex. 24
4. Panchnama reg.muddamal ex, 25
5. Scene of offence ex. 31
6 Panchnama re.weapon ex 37
7 Panchnama re-scene of offence,ex 48

We have scanned, scrutinised and evaluated the entire evidence exhaustively and have also heard rival submissions. We have ,therefore, not the slightest hesitation in finding that the appeal at the instance of the appellant -accused who has, as such, indulged in ghastly killing,after satisfaction of his lust,has been totally meritless requiring no interference. Not only that, as observed by us hereinabove, during the entire testimonial collection and the documentary evidence we scanned through ,even prima facie, we fail to comprehend as to how and why the trial court recorded acquittal of the appellant of charges under sections 366, 376 and 302,IPC when the evidence has unstintedly, unhesitantly and unambiguously had shown all material requisites constituting offence under the aforesaid sections which has not startled our mind but has shattered our judicial

conscience.

Again, the action of the State in acquiescing and not taking any action against acquittal of the appellant of the aforesaid charges has violently shattered our conscience.If the State opts to acquiesce in such heinous and ghastly offence against a minor baby aged 5, one would be tempted to say that the approach of the State is not only insensitive ,not only unreaonabel,not only unjust but is unmindful.But for the inhibition provided in the provisions of Section 401 (3) of the Code of Criminal Procedure,we would have issued notice for quashing the acquittal under sections 302, 366 and 376 of the IPC.Our attention was drawn to a decision of the Honourable Apex court in Bansi Lal vs Laxman Singh, AIR 1986 SC 1721, in which limitations and fetters on the part of the High court in case like the present one on hand, in absence of acquittal appeal or in revision of the private party in view of provisions of section 401 (3) of the Code of Criminal Procedure,are discussed. We were repeatedly told that even no useful purpose will be served by issuance of notice for enhancement of maximum punishment provided for the offences for which the appellant is found guilty and again the time-lag which has weighed with us is of not less than eight years and the age of the accused which was 22 at the relevant time. Unfortunately, the learned trial Judge has failed to appreciate not only the factual scenario but also true proposition of law. We, therefore,in absence of acquittal appeal and claim of the private party by way of revision and the inhibition of section 401 (3) of the Code, painfully have to raise our hands in helplessness . We are fully convinced that the appeal is meritless ,but before concluding,we are not only tempted but compelled to observe the celebrated version:

A socially sensisized judge is a better statutory armoury against gender outrage than a few clauses of complex statutory provisions with all protection writ into it.

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